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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 886

PAUL M. HUGHES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING

The petitioner hereby applies for a rehearing of the Order of this Court, dated April 20, 1964, denying his petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit, which affirmed his conviction and sentence for conspiring to violate the federal securities laws, 15 U.S.C. § 77.

REASONS FOR GRANTING REHEARING

The recent decision of the Court of Appeals for the Ninth Circuit in *Zaffarano* v. *United States*, rendered on April 6, 1964, highlights the appropriateness of reviewing the decision below in the instant proceeding.

In *Zaffarana*, the Ninth Circuit affirmed a trial judge's denial of a motion to withdraw a guilty plea prior to sentencing. In so doing, the court ruled:

> "While it is true that leave to withdraw a guilty plea prior to sentencing should be freely allowed, [*Poole* v. *United States*, 250 F. 2d 396, 400 (D. C. Cir. 1957); *Kadwell* v. *United States*, 315 F. 2d 667, 670 (9th Cir. 1963)] the trial court has a wide discretion in passing on such a motion and the reviewing court will not disturb the trial court's ruling in the absence of an abuse of that discretion [*Vasquez* v. *United States*, 279 F. 2d 34, 37 (9th Cir. 1960)] particularly when, as here, the defendant did not allege his innocence of the offense charged. *United States* v. *Norstrand*, 168 F. 2d 481, 482 (2d Cir. 1948)."

In the instant proceeding, however, the courts below have rejected as immaterial all efforts by petitioner to prove his continuing belief in his innocence of the offense charged.[1] They have thereby rejected what this Court in *United States* v. *Norris*, 281 U.S. 619, 623, held was the most basic consideration in permitting an accused to withdraw a formal plea of guilt:

> "The remedy of the accused, *if he thought he had not violated the law*, was to withdraw, by

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[1] In *United States* v. *Norstrand Corporation*, 168 F. 2d 481, 482 (C.A. 2), cited in the *Zaffarano* opinion, the Second Circuit ruled that "When a defendant who has pleaded guilty makes application to withdraw his plea, he should at the very least allege that he was not guilty of the charge to which he pleaded."

> leave of court, the plea of nolo contendere [or of guilty], enter one of not guilty, and, upon the issue thus made, submit the facts for determination in the usual and orderly way." [Emphasis added.]

Petitioner was not only denied the opportunity to demonstrate his belief in his own innocence.[2] He was also denied permission to prove his good-faith performance with respect to cooperating with the Government in the "United Dye" case; that cooperation was concededly the consideration for the Government's representation that it would bring such cooperation to the judge's attention at the time of sentencing. Nor was petitioner permitted to prove that the Government's actual position at the sentencing—a statement that petitioner's cooperation had been "less than a hundred per cent"—was unreasonable or possibly even taken in bad faith.

When the dispute arose concerning the ability of petitioner to cooperate and the petitioner learned that the Government was not going to make a favorable statement at the sentencing, he attempted to withdraw his guilty plea. Yet the ruling below deprived him of all opportunity to explain this dispute and its relationship to the entry of the guilty plea, as well as the opportunity to demonstrate his belief as to innocence.

The ultimate question underlying this case is whether a defendant has any remedy whatsoever under Rule

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[2] The only evidence permitted by the courts below in any way bearing on petitioner's claimed innocence was a statement by the prosecutor that petitioner, during the course of an interview in which he was being coached for his "cooperative" testimony in the "United Dye" trial, had said that if asked at that trial he would admit his guilt. G.A. 99-100. Petitioner was allowed to deny making such a statement, but he was refused all opportunity to show that he believed himself innocent at that or any other time.

32(d) when faced with such a dilemma. That question assumes critical importance because it concerns the waiver of vital constitutional rights by defendants who are thus led into entering pleas of guilty.

The decision below, moreover, is contrary to the *dictum* announced by Judge Learned Hand in *United States* v. *Paglia*, 190 F.2d 445, 447 (C.A. 2), who stated:

> "... if in the case at bar the prosecutor did promise to recommend to the judge sentence of a fixed term, and by means of it induced the plea of guilty, and if upon that plea the judge at the prosecutor's recommendation imposed a substantially higher term, it would follow that Paglia might withdraw his plea, ..."

In *Paglia*, the defendant did not even claim to be innocent. Nonetheless, it was held that he was at least entitled to be resentenced at which time the prosecutor's representation to him would be honored.

Here, petitioner claimed to be innocent. The courts below deemed his claim of innocence immaterial and rejected offers to prove that he believed himself innocent prior to and subsequent to his change of plea. They acknowledged the representation by the prosecutor concerning an expectation of favorable comment to the sentencing judge about the petitioner's cooperation with the Government. However, they ruled that it was within the sole discretion of the prosecutor to determine, however unreasonable that determination may in fact have been, the degree of petitioner's cooperation.

The statements which the prosecutor did make to the sentencing judge, far from being favorable, pictured the defendant as an unrepentant, uncooperative and

obstructive person. A. 101-102. The District Judge treated the issue of cooperation as something that should be taken into consideration in determining the extent of punishment. G.A. 117a-122a. Although the District Judge stated that he would give petitioner full credit for the cooperation he gave in the "United Dye" case and disregard completely any reference to a possible lack of cooperation, the very harsh statement by the prosecutor must have had some effect on the judge. Surely, had the petitioner obtained from the Government the promised favorable statement his position would have been enhanced,

> ". . . for we all know that, although a judge is not bound to accept recommendations, he is extremely likely to be influenced by them." [*United States* v. *Paglia*, 190 F. 2d at 447]

Under these circumstances the defendant ought to have a remedy of some kind.

If the prosecutors here suspected that the petitioner was withholding material information and their suspicions were unfounded, unreasonable, or possibly in bad faith, surely the petitioner should not have been pictured to the sentencing court as an unrepentant, uncooperative criminal.

But what is a defendant's remedy when the Government is about to make a statement about him which is untrue, unfounded, unreasonable and possibly in bad faith, and the Courts do not permit him to show this with competent proof? *A fortiori*, what is a defendant's remedy where the Government agreed to make a favorable statement about him as part of the negotiation that led to his plea of guilty? The Sixth Circuit's answer to this type of question in *Ward* v. *United*

States, 116 F. 2d 135, was to order the trial judge to permit the withdrawal of the guilty plea. That should also be the answer here.

Certainly here a change of circumstances occurred which petitioner could not have foreseen when he pleaded guilty. He had thought that he could cooperate with the Government and that his cooperation would entitle him to be pictured to the sentencing court as a cooperative defendant. Two years after his change of plea he found himself unreasonably suspected of withholding information the nature of which he still does not know or understand. See, 223 F. Supp. at 480-1.

The petitioner in such dilemma should have some remedy and the most obvious remedy lies in Rule 32(d). Petitioner performed his part of the plea-bargain by cooperating with the Government in the "United Dye" trial. The Government cannot be prejudiced by permitting him the opportunity to revert to the *status quo* and withdraw his plea of guilty. See, *Paglia* v. *United States, supra; Ward* v. *United States, supra.*

CONCLUSION

For the reasons set forth above, this Court should grant rehearing.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, being the counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

EUGENE GRESSMAN